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No. 93-1628

IN THE
Supreme Court of the United States
October Term, 1993

RONALD FORTIN & ANOTHER,
Petitioners,
v.
ROMAN CATHOLIC BISHOP OF WORCESTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED

Does the First Amendment bar adjudication of a dispute over a bishop's promise to keep a parish open?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondent, Roman Catholic Bishop of Worcester (Bishop), presents the following facts to correct inaccuracies and omissions in the statement of the case made by the petitioners, Ronald Fortin and David Desroches (Parishioners). In the following statement, all facts not taken from the opinion of the Massachusetts Supreme Judicial Court, *Fortin* v. *Roman Catholic Bishop of Worcester*, 416 Mass. 781 (1994) (Petition A-1) or the trial court (Petition A-10) are drawn from uncontroverted affidavits or undisputed documents.

1. *The Roman Catholic Church.* The Roman Catholic Church is a hierarchical organization. Each diocese and parish is a purely ecclesiastical subdivision of the church. Under church law, a parish *cannot* exist as an autonomous unit.

The Roman Catholic Church has a well-articulated system of canon law, including adjudicatory procedures for the resolution of disputes. Under this system, the Parishioners are entitled to lodge an appeal of the Bishop's decision to merge their parish and close the parish church. The appeal would be heard by a tribunal known as the Congregation for Clergy, which adjudicates disputes such as the present one.

2. *Parish history*. St. Joseph's parish was established in Worcester, Massachusetts, in 1890. In 1891 the parish group purchased land, and later it financed construction of a church on the land. The parish became part of the Diocese of Springfield, Massachusetts.

In 1924 the parish voted to raise funds for a new church on a new site. By 1929 the new church (St. Joseph's Church) had been built on Hamilton Street in Worcester. The church occupied part of a tract of land owned by the Roman Catholic Bishop of Springfield. The parish moved to the new church.

In 1950 the Holy See created the Diocese of Worcester. The parish of St. Joseph's Church became part of the new diocese.

In 1991 the church needed substantial repairs. The Bishop met with the pastor and parish members to discuss the problem. Later the Bishop's representative met with certain parish members. Allegedly the Bishop's representative said that if the parish members raised half of the funds needed to repair the church, the diocese would lend the other half and the church would remain open. The parish then mounted a pledge drive and obtained sufficient pledges. After further deliberation, however, the Bishop decided to merge St. Joseph's parish with another parish and to designate the other parish's church as the sole place of worship for the merged parish.

The merger took effect June 1, 1992. The Parishioners commenced this action the same day.

In their description of parish history, the Parishioners make several serious errors. First, they wrongly state that the founders of the parish formed a corporation in the 1880's. Petition 3. The trial court found that no corporation had been formed Petition A-14, and the Supreme Judicial Court did not upset that finding. *Fortin* v. *Roman Catholic Bishop of Worcester*, 416 Mass. at 784, n.3.

A misleading assertion appears in the very first paragraph of the Parishioners' statement of the case. There they assert as a fact that the Bishop issued a "mandate" to "destroy the church building and sell the land". Petition 2. Since this assertion has no bearing on the question presented, the Bishop assumes it was included to create sympathy for the Parishioners.

The Parishioners' unsworn complaint alleged that the Bishop planned to demolish the church and sell the land. The allegation was never proven or supported with any evidence. The only evidence concerning any episcopal "mandate" was the Bishop's affidavit to the effect that he ordered a merger of St. Joseph's parish with another parish.

The Parishioners conclude their statement of the case as they began it, with a misleading assertion designed to elicit sympathy. They assert that the Bishop "confiscated the parishioners' real and personal property". Petition 5. "Confiscation" implies seizure of another's property. Since the lower courts have ruled that the Bishop owns St. Joseph's Church, he cannot be said to have "confiscated" it.

3. *The property*. In 1912, before creation of the Diocese of Worcester, the Bishop of Springfield acquired title to an entire city block in Worcester. In 1914 he conveyed it to St. Joseph's School of Worcester, a corporation (School Corporation).

In 1927 the School Corporation conveyed most of the block back to the Bishop of Springfield. The School Corporation

retained title only to a corner lot at the intersection of Chrome Street and Plantation Street. The Parishioners wrongly assert that St. Joseph's Church was built on the retained corner lot. Petition 3. In fact a school was built there. St. Joseph's Church was built not on the corner parcel retained by the School Corporation but on the main parcel reconveyed to the Bishop in 1927.

In 1950 the Bishop of Springfield conveyed the main parcel, including the church on Hamilton Street, to the newly created Bishop of Worcester. In 1958 the School Corporation conveyed the remainder of the block, the lot at the corner of Chrome Street and Plantation Street with the school on it, to the Bishop of Worcester. By 1958, therefore, the Bishop owned the entire city block. The trial court and the Supreme Judicial Court both ruled that the Bishop holds full legal and equitable title to the entire block. *Fortin*, 416 Mass. at 790.

4. *The "promise"*. The Parishioners rest their entire argument upon an alleged promise. For present purposes, the substance of the alleged promise is not disputed. In the Parishioners' own words, "[t]he very substance of the Bishop's promise is the promise to keep the parish open". Brief of Plaintiffs-Appellants (to the Massachusetts Appeals Court) 25.

The determinative feature of this case is the *scope* of the alleged promise. The Parishioners do not allege, for example, that the Bishop promised to give them any interest in the real estate; they allege only that he promised not to close the parish of St. Joseph's Church.[1]

[1] The Bishop conceded only for summary judgment purposes that he made this promise. At trial the Bishop would prove that his representative promised to keep the church open *if* the Parishioners bore the cost of repairs and *if* the Parishioners presented a satisfactory feasibility study. Petition A-12, n.5.

SUMMARY OF ARGUMENT

1. This case does not present the question framed by the Parishioners. They pose a question based upon uniformity: may a state court apply neutral principles of law to *one* portion of a church property dispute without applying the same principles to *another* portion of the same church property dispute? The Parishioners argue that the Supreme Judicial Court, which applied neutral principles of law to determine the ownership of St. Joseph's Church, was obliged to apply the same principles to resolve a dispute over the Bishop's promise not to close the parish. *Infra*, 6-7.

The fallacy of the uniformity argument is that the two portions of the case are not uniform. One portion presents a straightforward issue of title to real estate. Neutral principles of trust and property law can be applied to resolve that issue. The other portion of the case differs fundamentally, because it is not a dispute over title to real estate. It is a dispute over a promise to refrain from merging one parish with another. Neutral principles of trust and property law cannot resolve the latter question. *Infra*, 6-8.

2. The question properly presented is whether the First Amendment bars adjudication of the promise-based claims. Those claims challenge the wisdom of a parish reorganization. This Court has held that the First Amendment precludes the civil courts from taking jurisdiction of a dispute over the reorganization of a diocese. *Serbian Eastern Orthodox Church* v. *Milivojevich*, 426 U.S. 694 (1976), *reh. denied*, 429 U.S. 873. No principled distinction can be drawn between the diocesan reorganization in *Milivojevich* and the parish reorganization in this case. Since this case represents a mainstream application of *Milivojevich*, no writ of certiorari should issue. *Infra*, 8-13.

The Parishioners insist that the Bishop promised to keep their parish open. In prior briefs they have admitted, however, that the civil courts *cannot* order a bishop to keep a parish open. This Court should not hear a case in which the petitioners seek to take a position they previously abandoned. *Infra*, 9-11.

3. The Court will find no special or important issue in the Parishioners' claim that the state court has condoned a form of episcopal despotism. The Supreme Judicial Court has not hesitated to take jurisdiction of church-related disputes, and its opinions reveal no special deference to episcopal authority. The Court's decision in the present case rests upon the well-settled principle that the civil courts may not intervene on *either* side of a dispute which involves not the ownership of property but the wisdom of an ecclesiastical decision. Issuing a writ of certiorari in such a case would not advance First Amendment jurisprudence. *Infra*, 13-19.

ARGUMENT

No Writ of Certiorari Should Issue, Because This Case Presents Neither the Question Framed by the Parishioners Nor Any Other Substantial Question.

A. *This Case Does Not Present the Question Framed by the Parishioners.*

The Parishioners have framed a question which, in the abstract, presents an interesting jurisprudential puzzle: may a civil court apply this Court's "neutral principles" analysis to one part of a church property dispute but not to another part? Petition 5. Unfortunately for the Parishioners, this case does not present that question.

The Supreme Judicial Court bifurcated the Parishioners' claims for good reason. The Court observed that the Parishioners made two quite different assertions: (1) that the Bishop refused to recognize the Parishioners' alleged equitable title to the property (Ownership Claims); and (2) that the Bishop refused to honor his promise not to merge the parish and close the church for worship (Promissory Claims). *Fortin*, 416 Mass. at 784-785. The Court perceived a sharp distinction between the Ownership Claims and the Promissory Claims.

The Ownership Claims raise mainstream issues of trust law and property law. These issues are amenable to analysis through "objective, well-established concepts of trust and property law familiar to lawyers and judges". *Jones* v. *Wolf*, 443 U.S. 595, 603 (1979). Using those familiar concepts, the Supreme Judicial Court took jurisdiction of the Ownership Claims and ruled that the Bishop holds full legal and equitable title to St. Joseph's Church. *Id.* at 790.

The Promissory Claims present a different picture. The most obvious difference is that the Bishop's promise did not address property ownership. The Bishop promised only that he would not merge the parish and not close the church. He did *not* promise that he would convey the property to the Parishioners or that he would surrender any incident of ownership. Nor do the Parishioners argue the contrary. They have admitted consistently and forthrightly that the Bishop promised only to keep the parish open.

In their appellate brief, the Parishioners summed up the Bishop's promise as follows: ". . . keeping the parish open was the substance of the Bishop's promise . . .". Brief of Plaintiffs-Appellants 24. If the Bishop broke that promise, the remedy would not be found in well-established concepts of trust and property law. The only effective remedy would

be to order the Bishop to keep St. Joseph's Church open for worship.[2]

The Supreme Judicial Court saw a constitutionally significant difference between a dispute over ownership of a church building and a dispute over keeping a parish church open for worship. *Fortin*, 416 Mass. at 785. One is a classic church property dispute which invites resolution under neutral principles of trust and property law. The other is not at all a property dispute; it is a disagreement over the wisdom of merging two parishes and designating which of the parish churches should be used for worship. The Promissory Claims, therefore, do not present a property dispute. They present a dispute over the reorganization of parishes, which is a purely ecclesiastical matter. *See Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. at 721, discussed *infra* at 11-13.

The Parishioners disregard the fundamental difference between the Ownership Claims and the Promissory Claims. They frame the question presented to this Court as if this entire case involved a monolithic property dispute. By disregarding the difference between their claims, the Parishioners are able to pose a question which is intellectually interesting but is not germane to the present action. The only germane question is whether the Supreme Judicial Court properly declined to take jurisdiction over a claim that a bishop who holds full legal and equitable title to a parish church may be ordered to keep the church open for worship.

B. *No Writ Should Issue, Because the Decision of the Supreme Judicial Court Represents a Mainstream Application of the Holding of Serbian Eastern Orthodox Diocese* v. *Milivojevich.*

The Parishioners argue that the Supreme Judicial Court erroneously interpreted *Milivojevich* "to preclude civil jurisdic-

[2] The Parishioners do not contend seriously that they suffered any compensable damages.

tion of any action in the nature of contract or promissory estoppel against a Roman Catholic bishop by a Roman Catholic congregation." Petition 6. The short answer is that the Supreme Judicial Court neither reached that conclusion nor relied upon *Milivojevich* for it. The Supreme Judicial Court relied upon *Milivojevich* only for the following statement:

> To inquire into an alleged promise by the Bishop to keep a parish open or refrain from merging it with another parish was an impermissible intrusion into the Bishop's ecclesiastical authority.

Fortin, 416 Mass. at 785 (citing *Milivojevich*, 426 U.S. at 708-709).

This ruling does not purport to surrender jurisdiction over every contract claim and promissory estoppel claim made by a Roman Catholic congregation against its bishop; the ruling bars jurisdiction only over a specific promise to perform a specific ecclesiastical act.

For two distinct reasons, the ruling does not warrant further review. First, the ruling properly relies on *Milivojevich*. Second, the Parishioners have foreclosed themselves from challenging it.

1. The Parishioners Have Waived Any Claim That the Civil Courts Possess Jurisdiction to Enforce the Bishop's Promise.

During this litigation the Parishioners have made certain admissions. This Court should be made aware of them. To appreciate the Parishioners' admissions, however, one must appreciate the scope of the Bishop's alleged promise. In their state court appellate brief, the Parishioners summarized the promise as follows:

> The very substance of the Bishop's promise is the promise *to keep the parish open*.

Brief of Plaintiffs-Appellants 25 (emphasis added).

This unambiguous statement should be juxtaposed with the following admissions by the Parishioners:

> (1) In their own words, the Parishioners "*do not dispute or challenge the Bishop's ecclesiastical authority to disband the Roman Catholic ecclesiastical parish* or to determine any other matter of Roman Catholic doctrinal or procedural law. Plaintiffs contend only that defendant Bishop's closing of the ecclesiastical parish does not entitle defendant Bishop to ownership of the real estate . . .".

Plaintiffs' Opposition to Defendant's Motion for Summary Judgment 2-3 (emphasis added).

> (2) In the words of the motion judge, "Plaintiffs conceded at trail [sic] that the Bishop had the right and authority to merge the parishes."

Petition A-15.

> (3) In their owns words, "Parishioners concede that *it would be inappropriate for a civil court to order the Bishop to keep a parish open* as such would be an interference with his ecclesiastical authority."

Brief of Plaintiffs-Appellants 29 (emphasis added).

In their complaint, the Parishioners sought specific performance of the Bishop's alleged promise. In subsequent pleadings, however, the Parishioners admitted that no civil court could enter such an order.

By admitting that the Massachusetts courts could not specifically enforce the Bishop's alleged promise, the Parishioners foreclosed not only their demand for specific performance but also any demand for equitable relief arising from estoppel. A typical remedy for promissory estoppel is an injunction which compels the promisor to honor his promise. *See* Restatement (Second) of Contracts § 90. Such an injunction in the present action would be identical to an order for specific performance. By waiving any claim to an order for specific performance, therefore, the Parishioners have waived any claim for injunctive relief arising from estoppel.

This may explain why the Supreme Judicial Court gave relatively little attention to the Promissory Claims. *Fortin*, 416 Mass. at 785. The Court apparently recognized that the Parishioners had conceded a lack of jurisdiction by admitting that the Court could not order the parish kept open. The Supreme Judicial Court therefore paused over the issue only long enough to correct a broad jurisdictional ruling by the trial court. *Id.*

If this Court were to grant the petition, therefore, it would find itself in the position of reviewing an issue over which the Parishioners have conceded the civil courts lack jurisdiction.

B. *The Supreme Judicial Court Correctly Applied Milivojevich.*

The decision of the Supreme Judicial Court represents a mainstream application of *Milivojevich*. Granting the petition, therefore, would not afford this Court any opportunity to clarify the contours of the First Amendment.

In *Milivojevich*, 426 U.S. at 707, Bishop Dionisije sued to have himself declared the true diocesan bishop and to enjoin the hierarchy of his church from interfering with the property of his diocese. The hierarchy then commenced its own suit to confirm that Dionisije had been removed from office and to enjoin him from interfering with diocesan property.

This Court observed that the case was not primarily a property dispute. *Milivojevich*, 426 U.S. at 709. Whomever took office as diocesan bishop took control of diocesan property *ex officio*; the key issue, therefore, was the identity of the diocesan bishop. *Id.* at 709. "Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case involves not a church property dispute but a religious dispute . . .". *Id.*

The Illinois courts had declared Dionisije's defrockment to be invalid and had reinstated him as diocesan bishop. This Court held that the church hierarchy, not the civil courts, were entitled to make that determination. *Id.* at 708. As a consequence, the hierarchy was allowed to decide, indirectly, who would control diocesan property; but "the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation . . .". *Id.* at 720.

The Illinois courts also had invalidated the hierarchy's reorganization of the diocese. *Id.* at 721. This Court made short work of that ruling. It held that "the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs . . .". *Id.* The First Amendment ensures that religious bodies can "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 721, citing *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

No useful distinction can be drawn in civil law between the reorganization of a *diocese* and the reorganization of a *parish*. The Bishop chose to reorganize the parish of St. Joseph's Church by merging it with another parish, just as the bishops of Dionisije's church chose to reorganize his diocese by splitting it. Thus, the Bishop's action in the present case, no less than the hierarchy's action in *Milivojevich*, is "a matter of internal church government, an issue at the core of ecclesiastical affairs". *Milivojevich*, 426 U.S. at 721.

In one sense *Milivojevich* was a closer case than this one. *Both* parties in *Milivojevich* had commenced civil suits. Since both parties had invoked the jurisdiction of the civil courts, there was an argument that the courts should hear the case. *Milivojevich*, 426 U.S. at 725-726 (Rehnquist, J., dissenting). The present case is different. Here only one party, the Parishioners, has invoked the power of the civil courts; the Bishop has argued from the outset that the civil courts lack jurisdiction.

The Supreme Judicial Court rightly relied on *Milivojevich*, therefore, in ruling that the civil courts could not second-guess the Bishop's decision to close the parish. *Fortin*, 416 Mass. at 785. The only proper avenue for review of the Bishop's decision lies in an appeal to the tribunals of the Roman Catholic Church.

The record does not disclose whether the Parishioners have pursued such an appeal. Since the Bishop feels obliged to stay within the confines of the record, he will not comment further. The Bishop would not object, however, if the Parishioners chose to provide this Court with an accurate and complete account of any such appeal.

C. *This Case Presents No Reason for the Court to Revisit Jones* v. *Wolf*.

The Parishioners take an expansive view of *Jones* v. *Wolf*, 443 U.S. 595 (1979). They argue that a writ of certiorari should issue because, under *Jones*, the civil courts "must exer-

cise jurisdiction" over the Promissory Claims. Petition 10. To support this argument, the Parishioners label the Promissory Claims as claims in "contract".

The Supreme Judicial Court is well aware that the First Amendment does not shield religious organizations from all civil suits for breach of contract. *See, e.g., Willits* v. *Roman Catholic Archbishop of Boston*, 411 Mass. 202, 206 n.4 (1991) (court rejects argument that *Milivojevich* bars jurisdiction over wrongful discharge suit). The Court equally recognizes that religious organizations may be sued in tort. *See, e.g., Alberts* v. *Devine*, 395 Mass. 59, 72 (1985); *Murphy* v. *I.S.K.Con. of New England, Inc.*, 409 Mass. 842, 851 (1991).

The Supreme Judicial Court has taken jurisdiction of many controversies involving churches and has declined to take jurisdiction of many others. Whether the Court takes or declines jurisdiction depends not upon a case's label but upon its substance. *See, e.g., Gordotzer* v. *Kraft*, 360 Mass. 743, 744 (1972) (defamatory statement, although made in religious context, creates justiciable claim of libel); *United Kosher Butchers Association* v. *Associated Synagogues of Greater Boston, Inc.*, 349 Mass. 595, 599 (1965) (vendors' suit for interference with business not justiciable where outcome depends on religious authorities' refusal to designate products as kosher).

The Supreme Judicial Court consistently rules that the key jurisdictional factor is "the nature of the central issue to be resolved". *Gordotzer*, 360 Mass. at 744; *United Kosher Butchers Association*, 349 Mass. at 599. The Court refuses to decide cases in which the central issue is a religious matter, even where the plaintiff's claim purportedly sounds in contract. *See, e.g., Grosvenor* v. *United Society of Believers*, 118 Mass. 75, 91 (1875) (no jurisdiction where alleged breach of contract was deviation from Shaker doctrine); *see also Solomon* v. *Congregation Tiffereth Israel*, 344 Mass. 755, 756 (1962) (no jurisdiction over alleged breach of Mosaic law). The same

principle bars jurisdiction over cases which, although designated as claims in tort, require resolution of a dispute over religious doctrine. *See, e.g., Carter* v. *Papineau*, 222 Mass. 464, 467-468 (1916) (no jurisdiction over allegedly tortious exclusion from religious services); *see also Murphy* v. *I.S.K.Con. of New England, Inc.*, 409 Mass. at 851 (evidence of defendant's unorthodox religious beliefs inadmissible to prove tort).

The Court has not hesitated, however, to decide church-related cases in which the central issue lies within the competency of civil courts. *See, e.g., McNeilly* v. *First Presbyterian Church*, 243 Mass. 331, 338-339 (1923) (court will decide church property dispute which turns upon law of charitable corporations rather than canon law); *Moustakis* v. *Hellenic Orthodox Society*, 261 Mass. 462 (1928) (court will *not* decide who is true bishop under canon law but *will* decide whether members of charitable corporation were properly stricken from membership list); *Mitchell* v. *Albanian Orthodox Diocese*, 355 Mass. 278, 282 (1969) (court *will* decide who is true bishop where entitlement to office depends only upon bylaws of corporation); *Antioch Temple, Inc.* v. *Parekh*, 383 Mass. 854, 864 (1981), *cert. denied*, 474 U.S. 1014 (court awards property to local church determined to be congregational).

The Massachusetts courts have no practice of deferring to what the Parishioners call "episcopal despotism". Petition 10. Bishops of several churches, including the Roman Catholic Church, have seen the Massachusetts courts decline to enforce episcopal orders. *See, e.g., Canadian Religious Association* v. *Parmenter*, 180 Mass. 415, 424 (1902) (trustees of parish church corporation must follow law of trusts despite contrary order by Roman Catholic bishop); *Greek Orthodox Community* v. *Malicourtis*, 267 Mass. 472, 483 (1929) (local Orthodox church not obliged to follow orders of Metropolitan); *Antioch Temple, Inc.* v. *Parekh*, 383 Mass. at 857 (local church controls

property dispite contrary view of Apostolic bishop); *Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia* v. *Russian Orthodox Church of the Holy Resurrection, Inc.*, 35 Mass. App. Ct. 194 (1993), *further app. rev. granted*, 416 Mass. 1109 (local church free to change affiliation despite contrary order by Orthodox bishops).

In *Wheeler* v. *Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 63 (1979), *cert. denied*, 444 U.S. 899, the Court held that the First Amendment forbade inquiry into a property dispute within a hierarchical church, citing *Milivojevich*. The Supreme Judicial Court decided *Wheeler* two months before *Jones*, however. When the Court next faced a church property dispute, it recognized that *Jones* had removed any First Amendment bar to jurisdiction in such a case. *Antioch Temple, Inc.* v. *Parekh*, 383 Mass. at 866. The Court expressly confirmed this recognition in the present case. *Fortin*, 416 Mass. at 787-788.

If the Supreme Judicial Court were inclined to countenance episcopal despotism, as the Parishioners contend, then the Court would not have taken jurisdiction of the Ownership Claims. It would have declined to take jurisdiction because the Roman Catholic Church is hierarchical.

> The Bishop is correct when he states that, if we considered the present dispute only in terms of the traditional structural approach, we would not take jurisdiction. This is so because (1) the Roman Catholic Church is hierarchical and (2) it maintains an internal system of tribunals for resolution of disputes. Such facts were presented in a sworn affidavit of the Bishop which was appended to his motion for summary judgment.
>
> *Fortin*, 416 Mass. at 787.

Despite the Bishop's urging, the Court proceeded to take jurisdiction and decide the Ownership Claims using the neutral principles analysis of *Jones*. *Id.* at 788. This process demonstrates no favoritism or preference toward hierarchical churches in general or Roman Catholic bishops in particular. By departing from its customary hierarchical/congregational analysis, the Court actually went out of its way to hear the Parishioners' Ownership Claims. This indulgence, however, did not oblige the Court to apply *Jones* to the Promissory Claims.

Jones neither compels nor permits a court to use neutral principles of law in evaluating a bishop's promise to keep a parish open. See *Jones*, 443 U.S. at 602. Even if the Promissory Claims were "contractual", as the Parishioners say, *Jones* would not apply because it addresses property disputes, not contract disputes.

The Parishioners no longer deny that the Bishop holds full legal and equitable title to St. Joseph's Church; their petition to this Court challenges neither the methodology nor the outcome of the Supreme Judicial Court's decision concerning the Ownership Claims. As a result, there is no "property dispute" left to be resolved.

The methodology of *Jones* easily accomodates the Ownership Claims, but it cannot accommodate the Promissory Claims. The neutral principles method involves examination of "the language of deeds, the terms of the local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." *Jones*, 443 U.S. at 603. This examination focuses upon factors determinative of title to property. No such issue remains in the present case, because the Bishop holds title. The only issue left is the Bishop's promise, and *Jones* does not prescribe a regimen for resolving such an issue.

For the Parishioners' view of *Jones* to make any sense, this Court would have to hold not only that *Jones* extends to non-property disputes but also that *Jones* overruled *Milivojevich*. *Milivojevich* is an insurmountable obstacle, because it holds in part that a civil court has no jurisdiction to hear a dispute over the reorganization of church government. *Milivojevich*, 426 U.S. at 721. The heart of the Promissory Claims, in the Parishioners' own words, is a "promise to keep the parish open". This matter is as much "at the core of ecclesiastical affairs" as the reorganization of dioceses in *Milivojevich*. *Id.* Thus *Milivojevich* controls the present case — unless it was overruled by *Jones*.

Jones did not overrule *Milivojevich*. Indeed, *Jones* repeatedly cites *Milivojevich* approvingly.[1] *Jones*, 443 U.S. at 602, 603, 604, 605. Furthermore, one would not expect *Jones* to overrule *Milivojevich*, because the two cases dealt with different issues. *Milivojevich* dealt with an ecclesiastical dispute having incidental consquences for the control of property. *Jones* dealt with a property dispute having incidental ecclesiastical consequences. There is no inconsistency between the cases, and there is nothing in *Jones* to suggest that the First Amendment allows neutral-principles jurisdiction over core ecclesiastical questions.

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[1] The Parishioners take pains to quote the *Milivojevich* dissent authored by Justice Rehnquist. Petition 9. The *Milivojevich* dissenters, however, accepted the principle that civil courts must not intrude in favor of either side in a religious dispute. *Milivojevich*, 426 U.S. at 733 (Rehnquist, J., dissenting). The Chief Justice later joined a majority opinion which cited *Milivojevich* for precisely that principle. *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 110 S.Ct. 1595, 1599 (1990).

The *Milivojevich* dissenters were chiefly concerned that lower courts would feel obliged to enforce blindly any and every "decree of a church court", even a decree flawed by and obvious procedural error. *Milivojevich*, 426 U.S. at 727. The present case does not create that risk. There is no church court decree to be enforced, and the Parishioners have alleged no procedural error in the Bishop's decision.

The Parishioners' suggestion that neutral principles should be applied outside the field of church property disputes is not novel. It is an old idea which this Court has expressly discredited. In 1975 the Illinois Supreme Court attempted to apply neutral principles to judge the validity of the reorganization of Bishop Dionisije's diocese. *Milivojevich*, 426 U.S. at 721. This Court emphatically rejected that attempt. *Id.* Contrary to the Parishioners' contention, therefore, the present case presents no reason for this Court to revisit either *Jones* or *Milivojevich*.

To avoid the analogy to *Milivojevich*, the Parishioners characterize the Promissory Claims as non-religious. They describe them as "no less secular" than the Ownership Claims. Petition 8. Stretching even farther, the Parishioners assert that the Bishop's promise not to close the parish is within a class of "secular-based promises made in secular contexts". Petition 10. The short answer is that neither the promise nor the context was secular. When a bishop engages his parishioners in a discussion concerning the future of their parish as an ecclesiastical entity, the context is not secular. And when he makes a promise concerning the future of the parish as an ecclesiastical entity, the promise is not secular; it goes to the core of ecclesiastical governance.

The Parishioners are not without a remedy. If the Bishop has acted improperly, then the Parishioners may appeal to the canon law courts, where there exists an appellate tribunal competent to decide a dispute over the merger of parishes. The Parishioners' remedy with respect to the Promissory Claims lies in that court, not this one.

CONCLUSION

The Parishioners' petition presents neither the question they have framed nor any other special or important question. No writ should issue.

Respectfully submitted,

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